

UNITED STATES COAST GUARD

By an order dated 20 April 1983, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's Merchant Mariner's License upon finding proved the charges and specifications of violating a federal regulation and committing misconduct. The first charge and specification found proved alleges that Appellant wrongfully and willfully acted as master, in a capacity beyond the scope of his license, in violation of 46 C.F.R. §157.30-10(b), aboard the F/V LADY PACIFIC, O. N. 636 981, while the vessel sailed from Kodiak, Alaska to Seattle, Washington from 25 October 1982 through 31 October 1982.

The second charge and specification found proved

alleges that Appellant committed misconduct in that he operated the F/V LADY PACIFIC on the same trip with crew members not possessing valid certificates of service or merchant mariner's documents, thereby violating 46 C.F.R. §12.02-7(c)(1).

The hearing was held in absentia pursuant to 46 C.F.R. §5.20-25 at Seattle, Washington on 30 March 1983. The Investigating Officer introduced the testimony of one witness and eleven exhibits into evidence.

At the conclusion of the hearing, the Administrative Law Judge found that the charges and specifications had been proved and entered an order revoking Appellant's license.

The Decision and Order was received by Appellant on or about 30 August 1991, the Appellant's name having been placed on the Seaman's Locator List since 1983 when initial service of the Decision and Order was returned unclaimed. Appellant timely filed his notice of appeal to the Commandant on 12 September 1991, at the U. S. Coast Guard Marine Safety Office in Long Beach, California. Appellant requested a copy of the transcript of the hearing in his notice of appeal and also presented various arguments to support his case.

There was a record of the hearing made by a qualified reporter in this case. The Administrative Law Judge directed that a transcript of the hearing be prepared. However, in the eight year period between the time Appellant's license was revoked and Appellant was actually served with notice of that revocation, the record of the hearing was inadvertently destroyed. Consequently, I will consider Appellant's notice of

appeal letter dated 10 September 1991 and the case file to be the extent of the record on appeal.

The Administrative Law Judge's Decision and Order of 20 April 1983 referenced eleven exhibits received into evidence, none of which are contained in the case file on appeal. Copies matching the description of exhibits 1 and 3 are present in the case file.

OPINION

Suspension and revocation hearings are governed by the Administrative Procedure Act, 5 U.S.C. 551 et seq., and the Coast Guard regulations promulgated pursuant to 46 U.S.C. Chapter 77. 46 C.F.R. §5.501. The Administrative Procedure Act requires that agency decisions be based on the record which includes a transcript of the hearing and exhibits. 5 U.S.C. §556(e). The hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal. 46 C.F.R. §5.701(b). By statute and regulation Appellant is entitled to appeal from the decision of the Administrative Law Judge and to have his appeal considered on the record of the hearing including the transcript and exhibits. 46 C.F.R. §5.701, Appeal Decisions 2399 (LANCASTER) and 2394 (ANTUNEZ).

The National Transportation Safety Board has previously held that where several exhibits had been lost, a remand to the law judge below to reopen the proceeding in order to replicate the missing exhibits was consistent with the requirement of administrative due process. Engen v. Perry, 5 N.T.S.B. 2070 (1987). The exhibits in Perry were; 1) a hand sketch by a

witness of air traffic patterns, 2) a tape recording of radio transmissions, and 3) a transcript of the radio transmissions. The Board concluded that these exhibits could be accurately replicated because the witness could recreate the traffic pattern sketch and a duplicate tape of the radio transmission existed. Id. The replications would not deprive the respondent of administrative due process. Id.

In the present case, witness statements (Exhibits 9 and 10) would have to be replicated from the testimony of witnesses to events that occurred over ten years ago, if those witnesses could even be located. The witness in Perry had previously testified one year earlier when producing the sketch.

The government held a copy of the lost original radio transmission tape recording in Perry. In the present case, the government introduced copies of original documents for many exhibits (no.'s 2, 4, 5, 6, 7, 8). It may be very difficult to locate other copies or originals of some of these exhibits after so many years.

Because of the passage of time and the lack of spare evidentiary documents, I find this case distinct from Perry. I do not believe that a reopening of the hearing in order to receive replicated evidence would comport with the requirement of administrative due process.

There have been previous appeals from suspension and revocation hearings in which the Coast Guard was unable to supply a transcript to the Appellant upon request. Appeal Decision 1916 (McGOWAN) (court reporter "unable" to transcribe record), Appeal

Decision 2157 (KING) (no decipherable record remaining after five year interim between time of in absentia revocation and time of service of decision), Appeal Decision 2394 (ANTUNEZ) (court reporter lost notes), Appeal Decision 2399 (LANCASTER) (commercial court reporting service did not preserve record of hearing).

The present case is similar. There is no way to obtain a transcript of the hearing, and as previously noted, the record does not contain many of the exhibits referenced in the Decision and Order. Simply stated, the Appellant cannot be provided with the required record to assist him in preparing his appeal. Appeal Decision 1916 (McGOWAN). In the absence of the transcript of the hearing and most of the exhibits, there is no sufficient legal basis upon which to affirm the findings and order of the Administrative Law Judge. Appeal Decisions 2399 (LANCASTER), 2394 (ANTUNEZ).

CONCLUSION

The order of the Administrative Law Judge cannot be affirmed because a sufficient record of the proceeding cannot be prepared.

ORDER

The order of the Administrative Law Judge dated 20 April 1983, at Seattle, Washington, is VACATED, the findings are SET ASIDE, and the charges and specifications DISMISSED.

//S// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 11th day of May, 1992.